UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STATE OF CONNECTICUT and the GENERAL ASSEMBLY OF THE STATE OF CONNECTICUT,	)	
Plaintiffs,	)	
v.	)	Civil No. 3:05-cv-01330 (MRK)
MARGARET SPELLINGS, SECRETARY OF THE DEPARTMENT OF EDUCATION,	)	
Defendant.	)	March 30, 2006

DEFENDANT'S MEMORANDUM REGARDING PLAINTIFFS' AMENDED COMPLAINT

TABLE OF CONTENTS

INTRODUCTION

At the January 31, 2006 oral argument on the Secretary's Motion to Dismiss, the Court indicated that it would allow the State to amend its complaint to correct two defects identified by the Secretary: the failure to identify an actual requirement of the NCLB, as interpreted and implemented by the Secretary, that would require the expenditure of State funds; and the failure to allege facts to support the State's argument that the Secretary failed to exercise discretion when she denied the State's waiver requests.[1]

The Amended Complaint submitted by the State fails to correct either defect. With regard to the yearly assessment requirement, the new expenses that the State identifies once again result from an undertaking – this time, a hypothetical one, i.e., administering the Connecticut Mastery Test ("CMT") in grades 4, 6, and 8 and a multiple-choice test in grades 3, 5, and 7 – that is not required by the NCLB or the Secretary. The State's additional claim that Deputy Secretary Simon violated the NCLB's prohibition against mandating the adoption of particular assessments when he suggested a less expensive alternative to the CMT is baseless. With regard to testing students with disabilities at grade level and testing students with limited English proficiency ("LEP" students) during their first three years in a U.S. school, the State does not even attempt to allege that these undertakings would require the expenditure of State funds. Instead, the State newly claims that such testing would violate the statute's requirement that "reasonable accommodations" be made for students with disabilities and LEP students – a claim which ignores the fact that grade-level testing for all students and the inclusion of LEP

[1] At the time of writing, only a draft transcript from the oral argument is available. References to the argument, infra, are based on undersigned counsel's recollection and notes, as supported by the draft transcript. Counsel will review the final transcript when it becomes available to ensure the accuracy of these references, and will make any necessary corrections.

students in yearly testing are themselves expressly required by the statute. With regard to the Secretary's handling of the State's waiver requests, the State's new allegations affirmatively contradict the claim that the Secretary failed to give any consideration to waiving the every-year testing requirement. Furthermore, the Amended Complaint fails to identify any statutory or regulatory standards by which the Court could judge the agency's exercise of discretion in denying the State's waiver requests.

In addition, the memorandum accompanying the State's Amended Complaint goes well beyond explaining the significance of the amendments (as the Court requested) and is instead largely devoted to rearguing the significance and applicability of Thunder Basin v. Reich, 510 U.S. 200 (1994). This attempt by the State to supplement its previous briefs without seeking leave to do so is improper. It is also unavailing, as the State's newly posited distinctions between this case and Thunder Basin are all either without legal significance or based on an inaccurate portrayal of the enforcement review proceedings under the General Education Provisions Act ("GEPA").

Because the State's Amended Complaint, like the original complaint, does not establish this Court's jurisdiction or state a claim for which relief may be granted, the Secretary renews her request that the Court dismiss the State's claims with prejudice.[2]

[2] Rather than require the Secretary to submit a new Motion to Dismiss in response to the State's Amended Complaint, the Court asked each party to submit a brief regarding any additional allegations contained in the Amended Complaint, and indicated that it would consider these briefs in conjunction with the previous Motion. See January 31, 2006 Minute Order.

ARGUMENT

I. The Amended Complaint Does Not Identify Any Required State Expenditures

A. The Amended Complaint Does Not Allege that Every-Year Testing in Grades 3-8 Would Require the Expenditure of State Funds

In its original complaint, the State alleged that it would be forced to spend its own funds to administer the Connecticut Mastery Test ("CMT") in grades 3, 5, and 7. See Complaint ¶ 61. The Secretary responded by observing that neither the NCLB nor the Secretary requires any state to administer the Connecticut Mastery Test. See MTD at 24-25. The Court accordingly suggested that the State amend its complaint. As discussed herein, however, the newly added allegations fail to support a claim that the State would be forced to spend its own funds to administer those tests that *are* required by the NCLB (as interpreted by the Secretary).

First, the State alleges that it would have to expend its own funds to administer multiple choice tests in grades 3, 5, and 7, *while continuing to administer the CMT in grades 4, 6, and 8*. See Amended Complaint ("AC") ¶ 139. The NCLB, however, does not require the administration of the CMT in *any* grade. To the extent Deputy Secretary Raymond Simon suggested this hybrid approach as a possible solution to the State's financial complaints, he did not state – and the Amended Complaint does not allege – that the Secretary would (or did) *require* Connecticut to continue administering the CMT in grades 4, 6, and 8. See AC ¶¶ 134-35. The State therefore has yet to make the necessary allegation in order to state a claim: i.e., that there is no regime of testing in grades 3 through 8 that would meet the NCLB's requirements (or requirements imposed by the Secretary) and that could be implemented without the expenditure of State funds.

Second, the Amended Complaint alleges that a study commissioned by the General Assembly found that federal funding was insufficient to cover Connecticut's costs of compliance with the NCLB's assessment requirements. See AC ¶¶ 80-81.[3] The Amended Complaint fails to note that the finding was premised on Connecticut's implementation of the Connecticut Mastery Test. See Exhibit A at iii (cost estimate for assessments "includes adding Connecticut Mastery Tests (CMT) in Grades 3, 5, and 7"). This allegation thus suffers from the same defect as the allegations in the State's original complaint.

Finally, the State reiterates its allegation that the United States General Accounting Office ("GAO") has estimated that federal benchmark appropriations would cover only 59% of "Connecticut's estimated expenses" for NCLB assessments. AC ¶ 77. Once again, this number is premised on the State's administration of written-response tests. The same GAO study concluded that federal benchmark appropriations would cover 147% of the cost to Connecticut of administering multiple-choice tests. See Exhibit B at 19.[4]

---

[3] The Amended Complaint contains a similar allegation regarding local boards' cost of compliance. See AC ¶¶ 18, 83. Because no local board has joined this case as a plaintiff, these allegations are irrelevant; in any event, they suffer from the same defects, as set forth in this Memorandum, as the allegations regarding the State's costs of compliance.

[4] The State relies on the GAO study and the State's cost study to substantiate its claim that the Secretary's actions will require the State to spend its own money in order to comply with NCLB requirements. See AC ¶¶ 17, 18, 76, 77, 79, 80, 81. In considering a motion to dismiss, the court is "free to consider documents . . . whose terms and effect are relied upon by the plaintiff in drafting the complaint." Gryl v. Shire Pharm. Group, 298 F.3d 136, 140 (2d Cir. 2002); see also Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) ("[O]n a motion to dismiss, a court may consider . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.") (internal quotation marks and citation omitted); County of Suffolk v. First American Real Estate Solutions, 261 F.3d 179, 184 (2d Cir. 2001) (on a motion to dismiss, the court may consider "any documents . . . integral to the claims asserted").

B. The CMT Is Not Required, and the Secretary May Permissibly Suggest Less Expensive Alternatives

Unable to allege that federal funding would be insufficient to cover a non-CMT-based testing regime, the State adds two allegations ostensibly designed to suggest that the CMT is required. First, the Amended Complaint alleges that the Secretary approved the State's plan to administer the CMT without informing the State that its plan exceeded the NCLB's requirements. See AC ¶¶ 40, 90. This fact is without significance. The requirements set forth in the NCLB represent a minimum, not a maximum; states are welcome to go beyond these requirements if they so choose, and approval of a state's plan does not transform every element of that plan into a federally imposed requirement. Second, the Amended Complaint alleges that the Secretary never provided written assurances that administering multiple-choice tests in alternate grades would be acceptable. See AC ¶ 136. This fact, too, is without significance. In order to state a claim, the State must allege that the activity which would require the expenditure of State funds – in this instance, implementing a testing regime that includes the CMT in some or all grades – is mandated by the Act or by the Secretary. Failing to provide a written assurance that the CMT is *not* required is manifestly not the same thing as mandating the implementation of the CMT.

In addition, the Amended Complaint adds a claim that the State mentioned in a footnote in its Opposition: the claim that "Mr. Simon's oral suggestion [of multiple-choice testing] would have required Connecticut to redesign and modify its state plan, curriculum standards, and assessments, contrary to . . . 20 U.S.C. §§ 6311(b)(6), 6311(e)(1)(F), 6575, 6849, 7371, 7906(b)." AC ¶ 137; see also Opp. To MTD at 26 n.10. These provisions of the NCLB prohibit the Secretary, the Department, and/or other "officer[s] or employee[s] of the Federal

Government" from imposing certain "require[ments]" or "mandate[s]" regarding the content of the State's curriculum and/or the use of specific assessments or modes of instruction.

The obvious flaw in this claim is that Deputy Secretary Simon never mandated that the State do anything at all. As the State concedes, Deputy Secretary Simon's proposal for multiple-choice testing was merely a "suggestion" (AC ¶ 137), intended to help the State find a way to meet its requirements under the Act while staying within its budget. The State remains free to develop any form of testing it desires, so long as this testing meets the minimum requirements of the Act. If the State wishes to administer the CMT in grades 3, 5, and 7, the Secretary has not prohibited it from doing so. Nor would the "Unfunded Mandates Provision" somehow prohibit the State from using the CMT; even under the State's reading of 20 U.S.C. § 7907(a), the Act does not *forbid* states from spending their own funds, it simply forbids the Secretary from requiring it.

To the extent the State is claiming that the expenditure of State funds is "mandatory" because staying within its federal allotment would require the adoption of particular curricula or assessments in violation of the Act, this claim is equally unavailing. The statutory provisions cited by the State regarding control over assessments and curricula speak only to what the *Secretary* (or other officials) can or cannot mandate; they do not discuss the effect of budgetary constraints. Accordingly, no violation of these provisions occurs when a state adopts particular curricula or assessments in order to stay within budget. Any claim to the contrary would prove far too much: in essence, Congress would be required to fund, not only compliance with the Act's requirements, but whatever additional, non-required elements a state chose to include in its plan, lest failure to fund these elements "mandate" a change in standards or curriculum. Not

even the State has taken the position that Congress intended to commit itself to funding activities that go far beyond the Act's requirements.

C. The Amended Complaint Does Not Allege that Testing LEP Students In English Would Require the Expenditure of State Funds

In its original complaint, the State alleged that it would be required to spend its own funds to develop foreign language assessments for LEP students. See Complaint ¶ 62. The Secretary pointed out that foreign language assessments, according to the State's own complaint, are optional under both the NCLB and the Secretary's interpretation of the Act. See MTD at 26. At oral argument, counsel for the State represented that the State also would have to expend its own funds to test LEP students *in English*; the Court allowed the State to amend its complaint to make that allegation.

The Amended Complaint notably fails to allege that testing LEP students in English would require the expenditure of State funds. Instead, despite previously alleging that testing LEP students "in either English or their native language, after one year in a United States school" is a requirement of the NCLB (Complaint at ¶ 25), the State now alleges that testing LEP students in English after one year in a U.S. school would *violate* the NCLB – in particular, the requirement that states assess LEP students in a "valid and reliable manner" and provide "reasonable accommodations" on assessments. See AC ¶¶ 51-52, 128. The State thus seeks to establish that, in cases where foreign language assessments are not practicable, the Secretary is statutorily required to exempt LEP students from testing during their first three years in a U.S. school as a "reasonable accommodation."

The State's new claim that a 3-year exemption is required by the Act is difficult to reconcile with the fact that the State originally sought a *waiver* to implement such an exemption – thus clearly signaling the State's understanding that inclusion of LEP students in yearly testing, whether in English or a foreign language, is a statutory requirement. See AC ¶ 104(d). The State's original understanding was correct. The "reasonable accommodation" language on which the State now relies is located within a provision that affirmatively requires the participation of LEP students in yearly assessments:

> [A state's] assessments *shall . . . provide for . . . the inclusion of limited English proficient students*, who shall be assessed in a valid and reliable manner and provided reasonable accommodations on assessments administered to such students under this paragraph, including, to the extent practicable, assessments in the language and form most likely to yield accurate data on what such students know and can do in academic content areas, until such students have achieved English language proficiency as determined under paragraph (7) . . . .

20 U.S.C. § 6311(b)(C) (emphasis added). The entire premise of this provision is that LEP students *shall be included* within the yearly testing requirement – using foreign language assessments "if practicable" and other accommodations otherwise. A "reasonable accommodation," in that context, might include giving LEP students extra time on the tests or allowing them to use dual-language dictionaries. Excluding LEP students from testing, however, plainly would not satisfy the duty to test LEP students in a "valid and reliable manner"; similarly, not administering any assessment to LEP students would not constitute a "reasonable accommodation[] on assessments administered." The "valid and reliable manner" and "reasonable accommodation" requirements are clearly presented as the means by which yearly testing for LEP students is to be effectuated, not avoided.

D. The Amended Complaint Does Not Allege that Testing Students with Disabilities at Grade Level Would Require the Expenditure of State Funds

The State originally alleged that it would be required to expend its own funds to develop a regime of modified-standard assessments for certain students with disabilities. See Complaint ¶ 80. The Secretary noted that modified-standard assessments are not required; to the contrary, according to the State's own complaint, states must seek special permission to implement them. See Complaint ¶¶ 79-80. At oral argument, counsel for the State represented that the State would have to expend its own funds to test students with disabilities *at grade level*; the Court allowed the State to amend its complaint to make that allegation.

The Amended Complaint makes no allegation that testing students with disabilities at grade level would require the expenditure of State funds. See AC ¶ 115 ("Assessing a special education student at instructional level rather than chronological grade level would be cost-neutral."). Instead, the Amended Complaint alleges that testing students with disabilities at grade level would violate the NCLB's requirement that "reasonable accommodations" be made on assessments for students with disabilities. See AC ¶ 128. The Amended Complaint further alleges that "[t]esting special education students on topics that they have not been taught . . . undermines the purposes and goals of the Act." Id. The Amended Complaint thus presents the claim that out-of-level testing for students with disabilities is required by the Act itself.

Once again, the State's new claim that the Act requires states to assess students with disabilities out-of-level is incongruous, given that the State originally sought a waiver to implement out-of-level testing. See AC ¶ 104(c). And, once again, the State was correct in its apparent original understanding that the Act requires states to assess students with disabilities at

grade level. Testing students with disabilities out-of-level would require altering, not just the assessments themselves, but the academic content standards with which the assessments are aligned. The Act is unambiguous in its requirement that "[t]he academic standards required by [this Act] shall be the same . . . [for] all schools and children in the State." 20 U.S.C. § 6311(b)(1)(B). There is no provision in the Act that would allow the State to apply different academic content standards to students with disabilities. The purpose of providing accommodations on the assessments, accordingly, is not to apply different academic standards to students with disabilities, but to ensure that the assessments are presented in a form that meaningfully measures these students' achievement. As expressly set forth in the "reasonable accommodation" provision:

> [A state's] assessments shall. . . provide for. . . the reasonable adaptations and accommodations for students with disabilities . . . necessary to measure the academic achievement of such students *relative to State academic content and State student academic achievement standards*.

20 U.S.C. § 6311(b)(3)(C) (emphasis added). "Reasonable adaptations and accommodations" might include, for example, having math word problems read aloud to dyslexic students, or giving children with learning disabilities extra time to complete the test. Abandoning the applicable academic content standards, however, would not assist in measuring the achievement of students with disabilities "relative to State academic content standards," and it is affirmatively prohibited by 20 U.S.C. § 6311(b)(1)(B). To the extent students with disabilities in Connecticut are not being taught topics that are part of the State's adopted standards (as the Amended Complaint implies), this is itself a violation of the Act.

The Secretary has recognized that, for a small group of students with disabilities, testing at grade level may be inappropriate even with "reasonable accommodations" on the assessments.

The Secretary therefore has promulgated regulations setting forth a narrow exception to allow alternate achievement standards for those students with the most significant cognitive disabilities, and to allow the proficient scores of these students (subject to a cap of 1% of all students tested in the state or district) to count toward making adequate yearly progress ("AYP"). See 34 C.F.R. §§ 200.1(d), 200.6(a)(2)(ii)(B), 200.13(c)(1)(ii). But this exemption is allowed by the Secretary, not compelled by the Act; and the State has not alleged that federal funding is insufficient to cover the cost of assessments for this particular group of students. See AC ¶¶ 125-127. The State's allegations pertain to a different group of students – those with less significant cognitive disabilities. Although the Secretary has proposed regulations allowing states to implement a modified-standard regime for these students, and to count their proficient scores (up to 2% of all students tested in the state or district) toward making AYP, this, too, would represent an option created by the Secretary, not a statutory or regulatory requirement. See Notice of Proposed Rulemaking, 70 Fed. Reg. 74624, 74635 (Dec. 15, 2005). States that choose not to pursue this option – either because they deem it too expensive or for some other reason – must continue to adhere to the statutory requirement of measuring these less significantly disabled students against the same academic content and achievement standards, employing reasonable accommodations to facilitate this end. See 20 U.S.C. § 6311(b)(1)(B).

E. The State May Not Base Its Claims on Other Expenses Absent Any Allegation that the Secretary Has Required Them

The State's brief attempts to deflect attention from the adequacy of federal funding for assessments by arguing that this case goes beyond assessment-related expenses: "The State contends that *overall* federal NCLB funding is insufficient to meet the State's *overall* costs of complying with the NCLB Act requirements." State's Memorandum Regarding Its First Amended Complaint ("Pl. Mem.") at 8 (emphasis added). The Amended Complaint thus adds the allegation that, according to a study commissioned by the General Assembly, "the difference between federal NCLB funding and state costs of complying with NCLB mandates would be $41.6 million from fiscal year 2003 through fiscal year 2008." AC ¶ 79; see also AC ¶ 18 (alleging that, according to the commissioned cost studies, "assuming level funding, federal education funding [would be] insufficient to satisfy the additional costs to comply with the requirements of the NCLB Act imposed upon the State and local boards of education"); AC ¶ 78 (alleging that "[t]he unfunded burden on the State of Connecticut . . . of meeting the NCLB Act requirements through fiscal year 2008 will be in the tens of millions of dollars"). Only $8 million of this amount, the State alleges, is attributable to assessment spending. See AC ¶ 80.

The State forgets that all three of its causes of action derive from the Secretary's denial of its waiver requests. It is by denying these requests, the State has alleged, that the Secretary has required the State to expend its own funds in violation of the Act itself. See AC ¶ 14 ("By denying Connecticut's waiver requests, the Secretary is requiring Connecticut to expend substantial sums in excess of federal funding to comply with the NCLB mandates as interpreted by the Secretary and the USDOE."). Indeed, the State has taken pains to emphasize that it is *not* challenging the requirements of the NCLB, but rather the Secretary's interpretation and

administration of those requirements, as evinced by her denial of the waiver requests. See Opp. to MTD at 33-34; see also AC Prayer for Relief at ¶ 5 (asking the Court to "[i]ssue an order declaring that *the Secretary's implementation of* the NCLB Act violated the Spending Clause and the 10th Amendment") (emphasis added). The NCLB itself, the State argues, would *not* require the State to spend its own money on the measures in question. See MTD Reply at 33-34.

The Amended Complaint, like the original complaint, identifies only three instances in which the Secretary could be construed to have imposed a requirement (or otherwise "implemented" the Act): (1) the Secretary's denial of a waiver to permit Connecticut to continue its regime of every-other-year testing; (2) the Secretary's denial of a waiver to exempt LEP students from testing during their first three years of schooling in the U.S.; and (3) the Secretary's denial of a waiver to allow out-of-level testing for students with disabilities. The Secretary has disputed whether even these waiver denials, in the absence of an actual enforcement action, constitute sufficiently "final" action to challenge the Secretary's conduct. See MTD at 21-22. But it is beyond question that the State cannot challenge the Secretary's conduct where there has been *no* action by the Secretary – both because the case clearly would be unripe, and because the State would be unable to state a claim that the Secretary's conduct violated the NCLB, Spending Clause, Tenth Amendment, or Administrative Procedure Act. In short, unless and until the *Secretary* requires the State to assume the costs that are predicted in

the State's cost study[5] – and the State has not alleged that to be the case – these costs cannot serve as a basis for the State's claims.

II. The Amended Complaint Does Not Establish the Availability of Judicial Review Under the APA

A. The Amended Complaint Does Not Identify Statutory or Regulatory Standards for Judging the Secretary's Exercise of Discretion

The Administrative Procedure Act ("APA") does not provide for judicial review of agency actions that are "committed to agency discretion by law." 5 U.S.C. § 701(a). The Supreme Court has interpreted this provision to preclude judicial review where "a court would have no meaningful standard against which to judge the agency's exercise of discretion." Heckler v. Chaney, 470 U.S. 821, 828 (1984). The Secretary's Motion to Dismiss noted that the State failed to identify any statutory or regulatory standard that would be applicable to the Secretary's waiver decisions. See MTD at 51-55.

In its Amended Complaint, the State has made two attempts to cure this deficiency. First, the State presents the vague allegation that "[t]he Secretary's decisions regarding waivers are

---

[5] Moreover, even if these additional costs had been imposed by the Secretary, the study on which the State relies makes clear that the costs it identifies cannot be equated to additional revenues that the State must spend:

> Some costs associated with NCLB do not require new funding. Existing staff members currently engaged in closely related functions can be used without incurring additional expense. Therefore, it is important to note that the difference between federal funding and the cost of implementing NCLB is **not** a measure of a revenue shortfall requiring additional appropriations.

Exhibit A at 27 (emphasis in original). In other words, the study does not purport to measure the actual State expenditures that will be required to comply with the NCLB; it measures only what compliance would cost if no existing resources could be used, which is not in fact the case (as the study acknowledges). The State has not alleged any facts with regard to what its actual additional expenditures, if any, would be.

governed by the standards and purposes established by the NCLB Act." AC ¶ 189. The State does not specify any standards that would apply, however.[6] And, while the Secretary does not deny that Congress had a "purpose" in enacting the NCLB, this is true for *all* legislation. If the purpose behind an enactment were sufficient to provide a standard for any action the agency took pursuant to that enactment, courts always would have a "meaningful standard" to apply, and the exemption from judicial review set forth in 5 U.S.C. § 701(a)(2) would be nullified.

Second, the State adds the allegation that "[t]he Secretary's interpretation of the Unfunded Mandates Provision . . . renders her [waiver] decisions as . . . violate of [sic] the Administrative Procedure Act." AC ¶ 191. But in fact, as discussed at oral argument, the proper construction of the Unfunded Mandates Provision has nothing to do with the grant or denial of waiver requests. The purpose of the waiver provision is to obtain discretionary exemptions from "statutory or regulatory requirement[s]." 20 U.S.C. § 7861(a). By the State's own reading, the NCLB *does not require* states to engage in any undertaking (such as administration of yearly assessments) that would mandate the expenditure of state funds. See, e.g., AC ¶ 86. Accordingly, if the State were correct in its interpretation of the Unfunded Mandates Provision, there would be no "statutory or regulatory requirement" from which to seek a waiver in such cases. Put differently, because the Unfunded Mandates Provision (according to the State) exempts states from the NCLB's requirements by *legislative mandate*, it cannot provide a

---

[6] Certain allegations in the State's Amended Complaint suggest, without specifically alleging, that the NCLB's requirements of "reasonable accommodations" on assessments for students with disabilities and LEP students should govern the Secretary's waiver decisions. See, e.g., AC ¶ 160. As discussed above, however, the"reasonable accommodations" requirements are intended to govern the *implementation* of the assessment requirements, not the waiving of them. See Parts I.C & I.D, supra.

standard by which to judge the separate exercise of *administrative discretion* envisioned in the waiver provision.

If the opposite were the case – if Congress intended the Unfunded Mandates Provision, as interpreted by the State, to be effectuated through the waiver provision – there would be an important category of waiver requests for which the Secretary would be *obliged* to grant a waiver. The waiver provision, however, speaks entirely in permissive terms: "[T]he Secretary *may* waive any statutory or regulatory requirement . . . ." 20 U.S.C. § 7861(a) (emphasis added). A statement that the Secretary "may" grant a waiver necessarily implies that the Secretary may *not* grant the waiver; this option would be inconsistent with the State's reading – as would the absence of any indication in 20 U.S.C. § 7861 that the Secretary should consider the adequacy of federal funding when deciding whether to grant waivers.[7]

B. The Amended Complaint's Allegations Do Not Support a Claim that the Secretary Abdicated a Statutory Responsibility

The State's Opposition argued that judicial review should be available under the APA because the Secretary "has proclaimed that she will not exercise *any* discretion with respect to a whole category of waiver requests," and the Secretary's "refusal to consider waiver requests on this statutory provision [i.e., every-year testing]" violates the law. See Opp. To MTD at 54. The Secretary's Reply observed that the allegations in the Complaint did not support the claim that

[7] Indeed, the absence of any mechanism in the NCLB for implementation of the Unfunded Mandates Provision strongly supports the Secretary's interpretation of that provision. If the provision were designed to release states from compliance with otherwise applicable conditions of assistance, as the State argues, an implementation mechanism would be critical. Such a mechanism is far less important for a statutory provision that simply forbids federal officers and employees from adding unfunded requirements to the conditions of assistance established by the statute.

the Secretary had exercised no discretion in denying the State's waiver request. Rather, the allegations showed (if true) that the Secretary had decided not to grant any waivers from the yearly testing requirement – a decision that was itself an exercise of discretion. See MTD Reply at 18-19. The Court accordingly allowed the State to amend its Complaint to attempt to show that the Secretary failed to give any consideration at all to the State's waiver request.

While the State's briefs do not clearly articulate the legal theory that would be implicated by the Secretary's alleged failure to consider the State's waiver requests,[8] the State's Amended Complaint and counsel's assertions at oral argument indicate that the State is relying on an "abdication of statutory responsibilities" theory. This theory, which applies in cases where the challenged agency action otherwise appears to be "committed to agency discretion by law," stems from the following *dicta* contained in a footnote in Heckler v. Chaney, 470 U.S. 821, 833 n.4 (1985):

> We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it justifiably could be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. See, *e.g.*, *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d

[8] The State's Opposition posited that the Secretary's alleged refusal to consider waiver requests "provides a clear statutory and factual benchmark against which the Secretary's actions can be reviewed by the Court." Opp. to MTD at 54. But a refusal to consider waivers is not a "statutory benchmark" by which a refusal to consider waivers may be judged. The Opposition also posited that, by refusing to consider the waiver requests, the Secretary "has relied on factors Congress did not intend [the agency] to consider or has failed to consider relevant factors or an important aspect of a problem." Opp. to MTD at 54. However, a claim that the Secretary has relied on inappropriate considerations is wholly inconsistent with the claim that she gave the waiver request no consideration at all, and a claim that the Secretary failed to consider "relevant" factors ignores the fact that Congress specified no factors that the Secretary should consider. The State's Memorandum, the purpose of which is to explain the significance of the amendments to the complaint, contains no discussion of the legal theory behind its new allegations. See Pl. Mem. at 10-11.

> 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that in those situations the statute conferring authority on the agency might indicate that such decisions were not "committed to agency discretion."

In the case that the Court cites as an illustration of this "abdication" theory, Adams v. Richardson, the Secretary of Health, Education, and Welfare ("HEW") had engaged in a deliberate policy of continuing to provide federal funding to public educational institutions that engaged in racial segregation, despite the fact that Title VI of the Civil Rights Act of 1964 prohibited racial discrimination on the part of institutions receiving federal funding. The court found that "Title VI not only requires the agency to enforce the [Civil Rights] Act, but also sets forth specific enforcement procedures," and that the agency had "consciously and expressly adopted a general policy [of non-enforcement] which is in effect an abdication of its statutory duty." Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc). This case is the only indication of what the Supreme Court meant by an "abdication of statutory responsibilities," as the Court has not revisited this theory in the 20 years since it was articulated. Cf. Riverkeeper, Inc. v. Collins, 359 F.3d 156, 170 n.17 (2d Cir. 2004) ("No party has directed us to, nor can we locate, a decision by a court of appeals that has found, in performing the *Chaney* analysis, a federal agency to have abdicated its statutory responsibilities."); id. at 170 (finding that no abdication occurred "even if we were to assume that the *Chaney* Court established by way of footnote 4 federal court jurisdiction over appeals from agency action" in abdication cases).

Assuming *arguendo* the validity of the "abdication" theory, the first task for the State is to identify the statutory responsibility that the Secretary has abdicated. In Adams, the statutory responsibility at issue was enforcement of the Civil Rights Act – a responsibility that was

expressly set forth in the statute. See Adams, 480 F.2d at 1162. Similarly, in the Second Circuit case of Riverkeeper, Inc. v. Collins, the plaintiff claimed that the agency failed to enforce a condition of licensing, thereby abdicating an express statutory requirement to ensure that licensed activities would adequately protect public health and safety. See Riverkeeper, 359 F.3d at 163. Here, the State has amended its complaint to allege that, "with respect to the formative-testing request" – the State does not make any such allegation with respect to the other two waiver requests – "the Secretary . . . abdicated her statutory duty to consider waivers of *any* statutory or regulatory requirement of the NCLB Act." AC ¶ 22 (emphasis in original).

In fact, however, the NCLB nowhere requires the Secretary to "consider" any and all waiver requests. Indeed, in contrast to the express statutory requirements at issue in Adams and Riverkeeper, the waiver provision imposes no requirements or responsibilities on the Secretary whatsoever; as noted above, it is phrased entirely in permissive terms, i.e., "the Secretary *may* waive any statutory or regulatory requirement . . . ." 20 U.S.C. § 7861(a) (emphasis added). This distinction is readily understood in light of the different types of agency activity at issue in these cases: Adams and Riverkeeper involved an agency's duty to enforce a statutory requirement, while this case involves an agency's discretion to waive a statutory requirement. In any event, regardless of the reason for the distinction, there can be no abdication of responsibility absent a responsibility to abdicate.

The hypothesis that the statute contains a "consideration" requirement suffers, not only from the lack of any language to that effect in the statute, but from the lack of any indication as to what such a requirement would entail. Would a requirement of "consideration" mean that the Secretary must address herself to the request and render a response? If so, the Amended

Complaint makes clear that the Secretary has done this. See AC ¶¶ 118, 131. Would it mean that the Secretary must give thought to the issue? The Amended Complaint's foray into mind-reading highlights the absurdity of attempting to enforce such a requirement. See AC ¶ 133 ("The Secretary never gave Commissioner Sternberg's reasons supporting Connecticut's waiver request any consideration."). But even if the statute did require the Secretary to think about the issue, the Amended Complaint confirms that she has done so: it correctly alleges that she authored an opinion piece on the subject, see AC ¶ 121, an allegation that is wholly inconsistent with the claim that the Secretary never gave the matter any thought. The Amended Complaint further alleges that the Secretary, on several occasions, provided a clear reason for her decision not to waive the every-year testing requirement – i.e., her judgment that the requirement is of particularly vital importance to the Act's overall goals. See AC ¶ 121 (the Secretary's op-ed stated that "annual assessments were one of the linchpins of the NCLB Act"); AC ¶ 129 (the Secretary has stated that testing in every grade "is one of the 'bright lines' and the 'linchpin' of the NCLB Act"); AC ¶ 153 (the Secretary issued public statements/letters indicating that "annual testing in reading and math in grades 3 through 8 and once in high school was one of the law's 'bright lines' – the essential and indispensable markers on the road to implementing NCLB'"). These allegations, too, refute any claim that the Secretary denied the waiver requests without thought or reason.

Of course, the best evidence regarding what consideration the Secretary gave the State's request would be the Secretary's letter denying that request. The State, however, has consistently and scrupulously avoided quoting from that letter or describing its contents. See AC ¶ 118 (alleging only that, "[o]n February 28, 2005, defendant Secretary Spellings denied

Commissioner Sternberg's waiver requests to conduct formative testing in the alternate years, and the three-year phase-in time period to test English language learners"). Accordingly, the Court has only the State's allegations regarding comments that the Secretary has made to the press and similar selected pieces of information – none of which, as discussed below, support the State's claim that the Secretary failed to consider the State's waiver request, even if one were to assume that "consideration" was a statutory responsibility.

The majority of the new allegations in the Amended Complaint pertain to comments made by the Secretary (or Deputy Secretary) *after* the Secretary denied the State's waiver request on February 28, 2005. See, e.g., AC ¶ 129 ("Since issuing her denial to Commissioner Sternberg's waiver request, Secretary Spellings has made numerous public statements . . . indicat[ing] that requests to waive the [testing] requirement would not even be considered."); AC ¶ 153 ("Since the issuance of her final denials, Secretary Spellings has publicly reiterated that an alternate-grade formative testing waiver request would not even be considered."); AC ¶ 120 ("On March 2, 2005" – after the Secretary had denied Connecticut's waiver request – "Deputy Secretary Raymond Simon appeared before the state board of education and indicated that a waiver to permit alternate-grade formative testing 'simply would not happen.'"). At most, these allegations demonstrate that the Secretary had decided not to give any *further* consideration to the issue. Given that nothing in the statute expressly or impliedly prohibits the Secretary from making a determination with regard to an entire category of requests, the Secretary would not violate any hypothesized "consideration" requirement by informing states, after having considered the issue in connection with Connecticut's request and reached a categorical determination, that she would not consider any additional requests in this category.

The only allegation regarding the Secretary's behavior *before* denying the State's request is the allegation that the Secretary did not accept Representative Nancy L. Johnson's suggestion "to contact and/or meet with Commissioner Sternberg to discuss Connecticut's waiver requests." AC ¶ 117, 119. This allegation posits yet another statutory responsibility: not only must the Secretary consider the waiver request that has been presented, she must solicit additional input from the State making the request. Nothing in the Act even suggests such an obligation. In any event, the Amended Complaint goes on to allege that, upon the State's request that the Secretary reconsider her denial of the waivers, the Secretary *did* provide a personal audience to the Commissioner and listened to what the Commissioner had to say. See AC ¶ 131. Although the Amended Complaint alleges that the Secretary announced a decision within an hour of this meeting, see AC ¶ 132, the meeting took place after the Secretary already had considered the State's request at some length – more than a month – and denied it. See AC ¶¶ 104, 118 (the State submitted its waiver request on January 14, 2005; the Secretary denied the request on February 28, 2005). The NCLB contains no provision for states to request reconsideration of a waiver denial. See 20 U.S.C. § 7861. The Secretary's willingness to reconsider the issue at all, even if briefly, goes beyond any responsibilities stated or implied in the statute.

Finally, in the absence of any facts that would establish the absence of "consideration," the State resorts to conclusory allegations that track the language of its claim. See AC ¶ 13 ("With respect to Connecticut's alternate-grade formative testing waiver request, Secretary Spellings has refused to exercise her statutory authority. Rather, the Secretary has abdicated her statutory duty to meaningfully consider a waiver request of any statutory and any regulatory requirement of the NCLB Act."); AC ¶ 133 ("The Secretary never gave Commissioner

Sternberg's reasons supporting Connecticut's waiver request any consideration."); AC ¶ 152 ("The Secretary refused to exercise her statutory discretion with respect to Connecticut's alternate-grade formative testing waiver requirement."). These conclusory allegations are unsupported by any well-pled facts in the Amended Complaint, and need not be accepted by the Court. See Virtual Countries, Inc. v. Republic of South Africa, 300 F.3d 230, 241 (2d Cir. 2002) ("Conclusory allegations in a complaint and declaration are not sufficient to create a material issue of fact."); Smith v. Local 819 I.B.T. Pension Plan, 291 F.3d 236, 240 (2d Cir. 2002) ("[C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (internal quotation marks and citation omitted); see also Hirsch v. Arthur Andersen & Co., 72 F.3d 1085, 1092 (2d Cir. 1995) ("General, conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint.").

In short, the Amended Complaint establishes that the Secretary addressed herself to the State's waiver request; responded to it by letter; agreed to meet with the Commissioner in person after a request for reconsideration; sent another letter after the meeting; published an op-ed on the subject; and made several public statements addressing her reasons for denying this category of waiver requests. See AC ¶¶ 104, 118, 121, 129, 131, 142, 153. It is readily apparent that the State's real complaint is not that the Secretary failed to devote any consideration to this issue, but that the Secretary's feelings on the subject were too strong – that she did not have a sufficiently "open mind." AC ¶ 130. Leaving aside the question of how the State ever could prove such an allegation, it is beyond question that neither the NCLB nor the APA requires a particular state of mind on the part of an agency official when making a decision. It was the

Secretary's considered determination that the requirement of annual testing is "indispensable" to the proper functioning of the NCLB (AC ¶ 153); the strength of her conviction on this matter is not reviewable by this Court.

III. The State's Memorandum Fails to Distinguish Thunder Basin

The Court's January 31, 2006 minute order required the State to file an amended complaint and "a brief explaining the significance of any amendments to the issues raised by the Motion to Dismiss." Instead of explaining the significance of the amendments, the first section of the State's brief is essentially a surreply regarding the application of Thunder Basin v. Reich, 510 U.S. 200 (1994). See Pl. Mem. at 5-8. Indeed, even as a surreply, this section would have been inappropriate, as each of the arguments in this section could (and should) have been made in response to Defendant's Motion to Dismiss.

In any event, the arguments contained in this section do not cure the jurisdictional defect in the State's case. The State begins by claiming that, "[i]n contrast to the plaintiffs in Thunder Basin who sought judicial review to avoid compliance with the statutory scheme, here the State is and remains in compliance with the provisions of the NCLB as interpreted by the Secretary." Pl. Mem. at 5. But of course, the entire purpose of the State's lawsuit is to secure a ruling that the Secretary's interpretation is incorrect so that the State will *not* have to comply with this interpretation. That was exactly the purpose of the plaintiff's lawsuit in Thunder Basin, as well. The import of Thunder Basin is that a plaintiff who wishes to avoid having a disputed interpretation of the law enforced against him or her must proceed through the statutory

enforcement review process. That reasoning applies – and courts have applied it – whether the plaintiff seeks to avoid that process by filing suit before or after noncompliance.[9]

Nor can the State distinguish Thunder Basin by reiterating the fact that GEPA "lacks any procedural mechanism for the State to even initiate a proceeding before the U.S. Education Department's administrative law judges; the Secretary must initiate an enforcement proceeding following a violation of the Act in order to invoke the GEPA administrative process." Pl. Mem. at 6. As the Secretary has pointed out, this was the case in Thunder Basin as well; the only means for the plaintiff in that case to challenge the validity of a Mine Act regulation was to raise the issue as a defense in enforcement proceedings. See MTD Reply at 2 (citing Mine Act, 30 U.S.C. §§ 814-816). The Court nonetheless held that the plaintiff could not bring a preemptive lawsuit of the type that the State seeks to bring here. Although the State's Memorandum echoes its suggestion at oral argument that there should be an exception for "sovereigns" (see AC ¶ 4), the statutory review process that the State seeks to avoid is in large part *designed* for sovereigns, given that state and local governments are the primary "recipient[s] of [federal education] funds." 20 U.S.C. §§ 1234c(a), 1234d(a).

---

[9] In Doe v. Federal Aviation Administration, for example, aircraft mechanics who alleged that they were improperly ordered to re-take a certification examination filed suit "rather than . . . refusing reexamination, thereby risking an FAA order suspending or revoking their certificates." Doe v. Federal Aviation Admin., 432 F.3d 1259, 1260 (11th Cir. 2005). The Court of Appeals noted that, had the mechanics refused to take the examination, thereby entering into noncompliance, the FAA would have initiated enforcement proceedings and the statutory review process would be triggered. The court held that, under Thunder Basin, "[t]he mechanics simply cannot avoid the statutorily established administrative-review process by rushing to the federal courthouse for an injunction preventing the very action that would set the administrative-review process in motion." Id. at 1263.

The State claims that it could not obtain relief through the GEPA process and is therefore in a "no win" situation, because the GEPA process "by definition must focus upon whether the State has violated the Act . . . not on the correct interpretation of [the Unfunded Mandates Provision]." Pl. Mem. at 7. The distinction is a false one. Plainly, the agency cannot determine whether the State violated the Act *without* determining the correct interpretation of the Unfunded Mandates Provision. If, in fact, the Unfunded Mandates Provision releases States from compliance with any requirements that would mandate the expenditure of State funds – as the State has claimed in this lawsuit – then the State would not have violated the Act by failing to comply with insufficiently funded requirements. The Secretary thus has made clear that the GEPA review process *would* provide for review of the Secretary's interpretation of the Unfunded Mandates Provision. See MTD Reply at 3.[10]

The State next advances the argument that the GEPA process necessarily would result in a finding that the State had violated the Act, "given the Secretary's directive that the State must be in violation in order to invoke the administrative process in the first place." Pl. Mem. at 7. This argument is patently without merit. The administrative process is invoked when the Secretary has "reason to believe" that a violation has occurred and therefore notifies the state of proposed enforcement action. See 20 U.S.C. §§ 1234c(a), 1234d(b). The entire purpose of the

[10] Moreover, even if the agency were somehow precluded from addressing the meaning of the Unfunded Mandates Provision in the administrative review process, there is no question that the Court of Appeals could address the matter on appeal from any adverse determination by the agency. Under such circumstances, a plaintiff cannot escape the statutory review proceedings by claiming that the administrative review process is insufficient. See Board of Governors v. McCorp Financial, Inc., 502 U.S. 32, 43-44 (1991) (statutory review process is adequate because "[i]f and when the [agency] finds that [the plaintiff] has violated that regulation, [the plaintiff] will have, in the Court of Appeals, an unquestioned right to review of both the regulation and its application").

administrative review process is to *review* the Secretary's initial determination that a violation has occurred, and to reach a final determination on this issue. If a finding of a violation were the inevitable result of the Secretary's initiating enforcement action, there would be no reason to have a review process in the first place.

In this same regard, the State is flatly wrong in asserting that "the Secretary contends that she has full, unreviewable discretion to withhold all federal education funding, if a State is found to have violated either the Act or its assurances." Pl. Mem. at 6 (internal citation and emphasis omitted).[11] To the contrary, the premise of the Secretary's Thunder Basin argument is that there *is* a statutory mechanism (i.e., GEPA) for review of any such enforcement action proposed by the Secretary. If this process yielded a determination – either by the agency or by the Court of Appeals for the Second Circuit – that the Unfunded Mandates Provision releases the State from compliance with the assessment requirements, then the enforcement action would be reversed and no withholding of program funds could occur, "retroactively" or otherwise. Pl. Mem. at 7.[12]

---

[11] This assertion is presented as a contrast to the situation in Thunder Basin, where (the State alleges) "the Secretary recommended a civil penalty to the independent commission, and the commission imposed the penalty, subject to specific factors." Pl. Mem. at 6 (emphasis in original). The Secretary previously has explained why the existence of an independent commission in Thunder Basin does not provide a relevant distinction from this case. See MTD Reply at 3-4.

[12] The Secretary has noted that, under 20 U.S.C. § 6311(g)(2), she could withhold certain administrative funds without proceeding through the GEPA review process, but that this relatively minor withholding would not inflict a severe enough hardship to allow the State to obtain judicial review prior to withholding. See MTD Reply at 8. The State's Amended Complaint alleges that the State's administrative funds under the NCLB are approximately $3 million per year. See AC ¶ 64. However, the statute allows the Secretary to withhold funds only for the administration of *Title I, Part A* of the NCLB. See 20 U.S.C. § 6311(g)(2). In accordance with 20 U.S.C. § 6304(a), this amount would be equal to one percent of the State's Title I, Part A funding. Connecticut's Title I, Part A funding is a matter of public record; accordingly, the Court may consider the fact that the State's Title I, Part A funding (cont'd)

The State further claims that, if the State decides to test its interpretation of the Unfunded Mandates Provision by not administering the required assessments, the State faces a penalty for violating its assurances (e.g., its assurance that it would administer assessments to grades 3, 5, and 7 in the year 2005-2006) even if a court ultimately agrees that it did not violate the NCLB. See Pl. Mem. at 6. In other words, even if the Unfunded Mandates Provision releases the State from compliance with the Act's requirements, it does not release the State from its assurances that it would comply with those requirements.[13] The dilemma that the State posits is illusory. The State can submit an amended plan with revised assurances, and indeed it must do so before taking any action that would be inconsistent with its existing plan and assurances. See 20 U.S.C. §§ 6311(f)(1)(B) & 6311(f)(2); 34 C.F.R. § 76.140(b). The State recognized as much in its new Prayer for Relief, which asks the Court to enjoin the Secretary from disapproving the State's amended plan. See AC Prayer for Relief ¶ 11. Were the Secretary to disapprove the plan based on her view that testing in grades 3, 5, and 7 is required regardless of available federal funding, the State could obtain an administrative hearing and then judicial review under the APA. See 20 U.S.C. § 6311(e)(1)(E). A ruling in the State's favor – i.e., a ruling that the Unfunded Mandates

---

for 2005-2006 is $107,510,828, one percent of which is $1,075,108. See http://www.ed.gov/about/overview/budget/statetables/index.html ("State Tables by Program" link); Byrd v. City of New York, 2005 WL 1349876, at *1 (2d Cir. June 8, 2005) ("[W]e have often held that material that is a matter of public record may be considered on a motion to dismiss.").

[13] The State wrongly asserts that the violation of assurances is "the true basis for GEPA enforcement actions." Pl. Mem. at 6. GEPA enforcement actions are triggered when "the Secretary has reason to believe that any recipient of federal funds under any applicable program is failing to comply substantially with *any requirement of law applicable to such funds*." 20 U.S.C. § 1234c(a) (emphasis added).

Provision releases the State from compliance with the testing requirement – would invalidate the disapproval, mooting or reversing any enforcement action premised on the old assurances.

Finally, the State claims that it faces immediate, inevitable harm if it decides to abide by the NCLB's testing requirements, inasmuch as "[t]he State currently is spending its own funds to satisfy the requirements of the NCLB Act." AC ¶ 9. The State does not explain the significance of this claim to the Thunder Basin analysis; in analyzing the applicability of the statutory review procedure in Thunder Basin, the Court's focus was on the intent of Congress and whether the plaintiff could obtain meaningful redress through the enforcement review proceedings.[14] In any event, the State's allegation does not support its claim that it faces immediate and inevitable harm as a result of compliance with the Act. As discussed above, the State has chosen to "satisfy the requirements of the NCLB Act" (AC ¶ 9) by implementing the CMT. See Part I.A, supra. While the CMT certainly satisfies the Act's requirements, it is not itself required. See Part I.B, supra. Accordingly, the "real, immediate harm" cited by the State is a result of its own choice to

[14] The plaintiff in Thunder Basin did raise an alternative due process claim, alleging that both compliance with the statute and violation thereof would "subject [the plaintiff] to a serious prehearing deprivation." Thunder Basin, 510 U.S. at 216. The Court found it unnecessary to consider the claim, however; and the State in this case has not raised a due process claim, let alone identified the property interest that would be implicated. Moreover, even if the expenditure of funds on a voluntary federal grant program could be characterized as a "deprivation of property," the State could avoid this deprivation by not administering assessments in grades 3, 5, and 7 (a course of action that would be lawful under the State's reading of the Unfunded Mandates Provision) – in which case the State would have access to a hearing before any serious "deprivation" in the form of agency withholding of program funds could occur. See 20 U.S.C. § 1234g(a) (final agency decision to withhold program funds must be stayed pending judicial review); 20 U.S.C. § 1234d(d) (Secretary not entitled to suspend program payments pending administrative hearing if the recipient of funds can show cause why suspension should not occur).

use the CMT, rather than any "mandate" that the State must follow if it wishes to remain in compliance with the NCLB.

CONCLUSION

For the reasons set forth above, in the Secretary's Motion to Dismiss, and in the Secretary's Reply, the Secretary respectfully requests that the Court dismiss the State's Amended Complaint with prejudice.

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General

KEVIN J. O'CONNOR
United States Attorney

JOHN HUGHES
Assistant United States Attorney

SHEILA M. LIEBER
Deputy Branch Director

/s/ Elizabeth Goitein
ELIZABETH GOITEIN
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7320
Washington, D.C. 20530
Federal Bar No. phv0649
Telephone: (202) 514-4470
Facsimile: (202) 616-8470
E-mail: elizabeth.goitein@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2006, a copy of the foregoing Memorandum Regarding Plaintiffs' Amended Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

/s/ Elizabeth Goitein
ELIZABETH GOITEIN
Trial Attorney
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W., Room 7320
Washington, D.C. 20530
Federal Bar No. phv0649
Telephone: (202) 514-4470
Facsimile: (202) 616-8470
E-mail: elizabeth.goitein@usdoj.gov